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American Small Business League

E-filing

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

AMERICAN SMALL BUSINESS LEAGUE CASE NO.

CV 08

0829

Plaintiff,

v.

UNITED STATES SMALL BUSINESS  
ADMINISTRATION

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF  
FREEDOM OF INFORMATION ACT  
(5 U.S.C. 552 (a)(3)(A))

**COMPLAINT FOR INJUNCTIVE RELIEF**

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, for injunctive and other appropriate relief for to compel the disclosure and release of documents improperly withheld from Plaintiff by the Small Business Administration.

**JURISDICTION AND VENUE**

2. This court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

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3. Plaintiff is the American Small Business League (ASBL), an organization incorporated in California which has its principal place of business in Sonoma County, California. ASBL is a national organization established to research and focus public attention on emerging small business issues and to otherwise promote the interests of small businesses. ASBL's activities include the review of evolving federal and state government policy and procedures to determine possible impact on small business.

## PLAINTIFF'S FOIA REQUEST AND THE SBA'S RESPONSE

6. By letter to the SBA dated September 20, 2007, ASBL requested a list of the specific firms that were identified as small businesses, and the contract amounts awarded to such

1 firms, upon which the SBA based its assertion that \$77.7 billion dollars had been awarded to  
2 small businesses, as claimed in the SBA's press release. Anticipating an evasive response on the  
3 part of the SBA, the ASBL specifically stated that a reference to the Federal Procurement Data  
4 Service, (FPDS-NG) an online database which contains information on all federal contracts,  
5 would not be considered an adequate response. The reason for this condition is that there was no  
6 practicable means of separating out the small business contracts identified and used by the SBA  
7 in compiling the figures announced in its press release, because no one knows what criteria the  
8 SBA employed to arrive at its figures. No one outside of the SBA knows the criteria employed by  
9 the SBA to identify the small businesses and contract amounts it totaled to arrive at the \$77.7  
10 billion dollar figure. It is, in fact a closely guarded secret. A true and correct copy of ASBL's  
11 FOIA Request of September 20, 2007 is attached hereto as Exhibit 2.

12 7. On or about October 24, 2007, the SBA responded by letter to ASBL, stating that  
13 "The SBA does not collect or maintain small business data in the format that you requested" and  
14 referred ASBL to a private contractor: "However, the information is available through a File  
15 Transfer Protocol (FTP) site maintained by Global Computer Enterprises, Inc. GSA's FPDS-NG  
16 contractor." As anticipated, the SBA told ASBL to contact a private firm to obtain access to the  
17 Federal Procurement Data System so that the ASBL could sift through data base and derive its  
18 own list of small business contractors. However, that was not ASBL's request. ASBL had  
19 requested the list that SBA must have compiled and consulted in order to issue its press release  
20 claiming that 77.7 Billion dollars in contracts had been awarded to small business. A true and  
21 correct copy of the SBA's response of October 24, 2007 is attached hereto as Exhibit 3.

22 8. By letter to the SBA dated November 15, 2007 ASBL appealed the SBA's refusal  
23 to provide its list of company names and contract amounts used to compute SBA's announced  
24 \$77.7 billion dollar figure. A true and correct copy of the Appeal is attached hereto as Exhibit 4.

25 9. On December 18, 2007 the SBA denied ASBL's appeal in its entirety and refused  
26 to produce any portion of the requested lists. The SBA stated:  
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1 The Small Business Administration (SBA) does not collect the information you  
 2 request. The General Services Administration's (GSA) Federal Procurement  
 3 Data System (FPDS-NG) is the federal government's repository for procurement  
 4 data. *When SBA finds a need for any information concerning Federal prime*  
*contracting awards to small businesses, ...we extract it from the FPDS-NG.* We  
 5 suggest you contact GSA directly through <https://www.fpds.gov>.....(emphasis  
 6 added)

7 A true and correct copy of the SBA's denial of ASBL's Appeal is attached hereto as  
 8 Exhibit E.

9 SBA's "response" is both contradictory and attempts to pass off the request to another  
 10 agency. SBA states that when it *needs information*, it *extracts the data* from the FPDS-NG data  
 11 base. Certainly, the SBA *needed information* to calculate and announce that \$77.7 billion dollars  
 12 were awarded to small businesses in 2006. Certainly SBA *extracted that data* from the FPDS-  
 13 NG SBA. ASBL's FOIA request was clearly directed to obtaining the information which SBA  
 14 extracted, then used, to derive its announced \$77.7 billion dollar figure. SNA's response was,  
 15 essentially, "go find it yourself". Unfortunately, without access to the criteria used by the SBA  
 16 to extract the information used in compiling its figure, it is impossible to duplicate or verify the  
 17 SBA's claim.

18 The Small Business Act provides:

19 The Administrator also shall be responsible for—

20 (A) establishing and maintaining an external small  
 21 business economic data base for the purpose of providing the Congress  
 22 and the Administration information on the economic condition and the  
 23 expansion or contraction of the small business sector. To that end, the  
 24 Administrator shall publish on a regular basis national small business  
 25 economic indices and, to the extent feasible, regional small business  
 26 economic indices, which shall include, but need not be limited to, data  
 27 on— ...

28 (ii) number of business establishments and the types of such  
 establishments such as sole proprietorships, corporations, and  
 partnerships;

(iii) number of business formations and failures;



(iv) sales and new orders;

.....  
(xi) number and dollar amount of mergers and acquisitions by size of acquiring and acquired firm; and

(xii) concentration ratios; and

(B) publishing annually a report giving a comparative analysis and interpretation of the historical trends of the small business sector as reflected by the data acquired pursuant to subparagraph (A) of this subsection.

Ironically, by its response, the very agency whose congressional mandate under the Small Business Act is to compile and maintain such detailed data claims it does not have a list of small businesses and the contract amounts those businesses were awarded in 2006. Yet, it does somehow know that those contracts total \$77.7 billion dollars, and that those contract went to "small" businesses.

10. ASBL has a right of access to the information requested pursuant to 5 U.S.C. § 552. (a)(3) and there is no legal basis for the SBA's denial of such access. The information sought contains statistical and other factual information about the allocation of contracts which is not subject to any exemption under the Freedom of Information Act and must be disclosed.

### **CAUSE OF ACTION**

#### **Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records**

10. The SBA has wrongfully withheld documents requested by Plaintiff.

11. Plaintiff has exhausted the applicable administrative remedies with respect to the SBA's wrongful withholding of the requested documents.

12. Plaintiff is entitled to injunctive relief and an order from this Court completing the release and disclosure of the requested documents.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff prays that this Court:

- 1 A. Issue an order compelling the SBA to deliver, in its entirety, the list of small  
2 businesses and the contract amounts such businesses were awarded which SBA extracted  
3 from the FPDS-NG, or obtained from any other process and/or through any other agency,  
4 which the SBA used to calculate it announced total of \$77.7 billion dollars referred to in  
5 its press release of August 20, 2007.
- 6 B. Provide for expeditious proceedings in this action;
- 7 C. Award plaintiff its costs and reasonable attorneys' fees incurred in this action; and
- 8 D. Grant such other relief as the Court may deem just and proper.
- 9
- 10

11 Dated: Feb 5 08

Gutierrez • Ruiz

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13 By: 

14 ROBERT E. BELSHAW

15 Attorneys for Plaintiff

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## PRESS OFFICE

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Date: August 20, 2007

Internet Address: <http://www.sba.gov/news>

Contact: Tiffani Clements (202) 401-0035

# SBA Scores Federal Small Business Procurement Efforts

*Publicly available reports and scorecard increase transparency in small business contracting.*

WASHINGTON – In an effort to increase the transparency and accountability in small business contracting, the U.S. Small Business Administration (SBA) released its first-ever Small Business Procurement Scorecard. The Scorecard will help agencies measure their achievements and progress in making contracting opportunities available to small businesses, improve the accuracy of contracting data regarding small businesses, and provide the public the opportunity to assess agencies' performance in meeting these goals.

"SBA's and the agencies' commitment to small business contracting results is unprecedented," said Clay Johnson, Deputy Director for Management at the Office of Management and Budget. "With clear, outcome-oriented goals, clear, realistically aggressive plans to achieve them, clearly defined accountability, and frequent tracking of performance, SBA and the agencies are saying they want to be held most publicly accountable for contracting with small business at desired levels."

## Small Business Goaling Report

SBA's Scorecard builds on a series of administration initiatives to improve small business access to federal contracts. At the request of the White House's Office of Federal Procurement Policy and SBA, federal agencies spent months reviewing 11 million contract actions from the last two years to cleanse the database of miscoded contracts. On June 30, federal regulations were changed. Contracts awarded to small companies acquired by large corporations will no longer count towards federal agency small business goals – even if the acquisition took place before the rule change.

After working with federal agencies to identify miscoding and anomalies in the contracting database, SBA released the annual Small Business Goaling Report for FY 2006, and revised the FY 2005 report. The Goaling Report shows that \$77.7 billion in federal contracts were awarded to small businesses in FY 2006, up \$2.7 billion from the previous year. The revisions reduce the share of contracts awarded to small businesses in 2005 \$4.6 billion from the previously-reported 25.4 percent to 23.4 percent. For 2006 the figure is 22.8 percent, just short of the small business procurement goal established by law at 23 percent.

"These changes – increased accuracy, transparency and accountability – provide a real window of opportunity for America's small businesses," said SBA Administrator Steve Preston. "Almost \$5 billion in misreported contracts have been cleaned out of the small business database. To meet their goals in 2007 and beyond, federal agencies know they will have to place more new contracts with small businesses. SBA is also increasing its staff and technical assistance to help our federal partners meet their contracting needs."



Administrator Preston cited the progress federal agencies have made towards meeting the five targeted sub-categories for small businesses procurement, as an example of what can be accomplished when agencies track progress towards small business goals.

"SBA is encouraged by the real gains made in every category in 2006," Preston said. "Contracts to companies owned by service-disabled veterans increased by 50 percent, from \$2 billion to \$3 billion; contracts to women-owned businesses increased by a billion dollars; contracts to 8(a) companies rose by \$700 million, contracts to HUBZone companies were up \$1 billion. These are accomplishments that our federal partners can be proud of, but still recognizing" we still have more to do to reach our targets," Preston said.

#### **About the Scorecard**

SBA rates 24 agencies green, yellow or red, both on whether they reached their annual small business contracting goals and on their progress on efforts to make contracting opportunities available to small businesses. To achieve a green rating a federal agency has to meet its overall small business contracting goal, as well as the goals for at least three of four subcategories. For their current status, seven agencies were rated green, five yellow, and 12 were red. In the second category, under "progress," 12 agencies were rated green, eight were yellow, and four were red.

Each federal agency has a different small business contracting goal, determined annually in consultation with SBA. SBA ensures that the sum total of all of the goals exceeds the 23 percent target established by law. The Scorecard will be updated every six months and is publicly available on the SBA website at [www.sba.gov](http://www.sba.gov).

"Small businesses play an important part in growing our nation's economy, and this Scorecard will help the agencies achieve contracting results that will keep our small businesses strong," said Administrator Paul Denett of the Office of Federal Procurement Policy (OFPP). "This new tool, along with better data in the goaling reports, will enable us to identify where we are strong and where need to improve."

#### **Small Business Goaling Summary Report**

<b>Category</b>	<b>Goal</b>	<b>2005 Previous</b>	<b>2005 Revised</b>	<b>2005 Revised \$\$</b>	<b>2006</b>	<b>2006 \$\$</b>
Small Businesses	23%	25.4%	23.4%	\$75 billion	22.8%	\$77.7 billion
Small Disadvantaged Businesses	5%	6.9 %	6.5%	\$21 billion	6.8%	\$23 billion
Service-disabled Vets	3%	0.6%	0.6%	\$1.9 billion	0.9%	\$2.9 billion
Women	5%	3.3%	3.2%	\$10.2 billion	3.4%	\$11.6 billion
HUBZone	3%	1.9%	1.9%	\$6.2 billion	2.1%	\$7.2 billion
8(a)	N/A	3.3%	3.7%	\$11.8 billion	3.7%	\$12.5 billion

The goaling reports released today by SBA are available at <http://www.sba.gov/aboutsba/sbaprograms/goals/index.html>

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From: Chris Gunn [mailto:cgunn@asbl.com]  
Sent: Thursday, September 13, 2007 4:14 PM  
To: FOIA  
Subject: Freedom of Information Act Request

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September 20, 2007

Chief, Freedom of Information/Privacy Acts Office  
Small Business Administration  
409 3rd Street, SW, Suite 5900  
Washington, DC 20416

Re: Freedom of Information Act Request

Dear FOIA Officer:

This is a request under the Freedom of Information Act. I request that a copy of documents containing the following information be provided to me:

- The specific names of firms that were coded as small businesses for FY 2006 and the specific dollar volume of contracts that were awarded to those firms. The contract for firms from FY 2006 should total \$77.8 billion as released by the Small Business Administration on August 16, 2007.

A response from you that indicates that this information is available on FPDS-NG will not be acceptable since the information is not readily available with the current search functionality. The specific names of the firms the government was referring to when they announced their small business contracting levels for FY 2005 and FY 2006 cannot be ascertained. We will not accept a response that indicates the information is available on FPDS-NG because it is not readily available with the current search functionality.

In order to help to determine my status for purposes of determining the applicability of any fees, you should know that I am the director of communications for a small business advocacy group and am seeking information for use in our group's research and not for commercial use.

I am willing to pay fees for this request up to a maximum of \$ 1000. If you estimate that the fees will exceed this limit, please inform me first.

I have included a telephone number at which I can be contacted during the hours of 8 a.m. to 5 p.m. PST, if necessary, to discuss any aspect of my request.

Thank you for your consideration of this request.

10/24/2007



**Higgins, Catherine Mccann**

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**From:** Koppel, Dean Robert  
**Sent:** Wednesday, October 24, 2007 10:57 AM  
**To:** 'cgunn@asbl.com'  
**Cc:** Collins, Arthur E.; Higgins, Catherine Mccann; Smith, Annie L.; Hall, Gregory L.  
**Subject:** FW: Freedom of Information Act Request #22382

October 24, 2007

Christopher Gunn, Communications Director  
American Small Business League  
3910 Cypress Dr.  
Petaluma, CA 94954

Mr. Gunn,

Thank you for your Freedom of Information Act request to the U.S. Small Business Administration (SBA) in which you've requested SBA provide you with a list of firms that were coded as small businesses for FY 2006 and the specific dollar volume of contracts that were awarded to those firms. You also pointed out that the contracts for firms from FY 2006 should total \$77.8 billion as released by the SBA on August 16, 2007. I understand that the information you are requesting will be used as part of your organization's research. You also stated that referring you to the FPDS-NG will not be acceptable since that information is not readily available. SBA does not collect or maintain small business data in the format that you requested. However, the information is available thorough a File Transfer Protocol (FTP) site maintained by Global Computer Enterprises, Inc., GSA's FPDS-NG contractor. Your request for this information should be addressed to:

Global Computer Enterprises, Inc.  
FPDS-NG Delivery Manager  
Federal Procurement Data Center  
U.S. General Services Administration  
2011 Crystal Drive, Suite 911  
Arlington, VA 22202

Please note that under the Freedom of Information Act, we are not required to create records in order to respond to a FOIA request. See Goldgar v. Office of Administration, 26 F.3d 32 (5th Cir., 1994). In addition, the Freedom of Information Act does not require "research of existing...records and...[the providing of] information obtained from that research." The Act provides access to existing records but does not establish a research service. See Frank v. Department of Justice, 941 F. Supp. 4, 5 (D.D.C. 1996) and Trenerry v. Department of Treasury, No. 92-5053, slip op. at 6 (10th Cir. Feb. 5, 1993).

You have the right to appeal this decision to the Chief, Freedom of Information/ Privacy Acts Office, U.S. Small Business Administration, 409 3rd Street, S.W. Washington, D.C. 20416. You must submit a written appeal that includes an original signature within 60 calendar days of the date the denial notice was received. Your appeal should contain a description of the information denied, the name and title of the SBA employee who denied the request, the reason for the denial, and other pertinent facts you deem appropriate.

10/24/2007



Sincerely,  
*Dean Kappel for*  
Arthur E. Collins  
Director  
Office of Government Contracting  
U.S. Small Business Administration

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**From:** Chris Gunn [mailto:cgunn@asbl.com]  
**Sent:** Thursday, September 20, 2007 4:14 PM  
**To:** FOIA  
**Subject:** Freedom of Information Act Request

September 20, 2007

Chief, Freedom of Information/Privacy Acts Office  
Small Business Administration  
409 3rd Street, SW, Suite 5900  
Washington, DC 20416

Re: Freedom of Information Act Request

Dear FOIA Officer:

This is a request under the Freedom of Information Act. I request that a copy of documents containing the following information be provided to me:

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A response from you that indicates that this information is available on FPDS-NG will not be acceptable since the information is not readily available with the current search functionality. The specific names of the firms the government was referring to when they announced their small business contracting levels for FY 2005 and FY 2006 cannot be ascertained. We will not accept a response that indicates the information is available on FPDS-NG because it is not readily available with the current search functionality.

In order to help to determine my status for purposes of determining the applicability of any fees, you should know that I am the director of communications for a small business advocacy group and am seeking information for use in our group's research and not for commercial use.

I am willing to pay fees for this request up to a maximum of \$ 1000. If you estimate that the fees will exceed this limit, please inform me first.

I have included a telephone number at which I can be contacted during the hours of 8 a.m. to 5 p.m. PST, if necessary, to discuss any aspect of my request.

Thank you for your consideration of this request.

10/24/2007



November 15, 2007

Chief, Freedom of Information/Privacy Acts Office  
Small Business Administration  
409 3rd Street, SW, Suite 5900  
Washington, DC 20416

Dear Mrs. Higgins:

This is an appeal under the Freedom of Information Act.  
My request was assigned the following identification number - 22382.

On 09/20/2007, I requested the following information from the Small Business Administration:

- 1- The specific names of the firms that were coded as small businesses for FY 2005 and the specific dollar amounts that were awarded to those firms. That list for 2005 should total \$75.1 billion as released by the Small Business Administration on August 16, 2007.
- 2- The specific names of firms that were coded as small businesses for FY 2006 and the specific dollar volume of contracts that were awarded to those firms. That list for 2006 should total \$77.8 billion as released by the Small Business Administration on August 16, 2007.

I also indicated that a response from you that indicates that this information is available on FPDS-NG will not be acceptable since the information is not available with the current search functionality. There are multiple fields that can be used to indicate small business status. It is not possible for any one outside of the SBA to ascertain the specific names of all firms coded as small businesses for any given year since it is not known what criteria the federal government has used to determine small business status.

Not only is this information not publicly available, it is such a closely guarded secret that no member of Congress has been able to obtain it. Even the nation's top experts in federal contracting data have admitted to us that the SBA has made it impossible for anyone outside of the agency to determine the exact names of all firms that were coded as small businesses for any given year.

In your response dated 10/24/2007, you stated that, "SBA does not collect or maintain small business data in the format that you requested." We do not understand the intent of this statement. We did not request a specific format. More importantly, you are no doubt aware that an agency must "provide the requested record in any form requested.... if the record is readily reproducible by the agency in that form or format." Moreover the agency must "make reasonable efforts to maintain its records in forms and formats that are reproducible for such purposes." 5 U.S.C. § 552 (a)(3)(B). It is not credible to assert that the SBA does not have reasonable access to the names of firms that are coded as small businesses for any given year since it is the SBA's job to collect, analyze and

monitor this data. Because it is indisputable that the agency has the discreet information requested in its databases that the ASBL has requested, extracting and compiling that data does not amount to the creation of a new record. *Schlasetsch v HUD* 99-0175 (2000 WL 33372125, at \*3) D.D.C April 4, 2000. See also *Thompson Publ'g Group v. Health Care Finance Administration* 92-2431, (1994 WL 116141 at \* 1) (D.D.C. March 14 1994) (finding that relatively simple computer searches and computer queries are reasonable for data that do not exist in a single computer document or file) ; *Yeager v DEA*, 678 F.2d 315,322 (D.C. Cir. 1982)(holding a request to encompassing over 1,000,000 computerized records to be valid because the "lynchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested'" (quoting legislative history))

Further, your attempt to refer this request to a private corporation—which is not subject to FOIA—is an act which "raises a genuine legal issue about the propriety" of a responding agency's action. See *Maydak v U.S. Dept of Justice*, 254 F. Supp. 2d 23, 40 (D.D.C. 2003)

It is also difficult to believe the SBA does not have this information since we have received FOIA responses from several other agencies supplying similar data.

This information should be readily available to the public and the SBA's continuing attempts to withhold this information are no doubt an attempt to cover up fact that an overwhelming majority of federal small business contracts are actually awarded to Fortune 1000 firms and their subsidiaries.

I would like to remind you that the ASBL has never lost a FOIA case against the SBA. In all of our previous cases the courts have not accepted the SBA's excuses and legal justifications for not releasing information we have requested under the FOIA. In past cases the SBA has intentionally made false statements to the court to try and withhold information.

I don't think it is a coincidence that in addition to refusing to release the names of firms coded as small businesses the SBA has also removed employee and revenue data from the government's vendor database to make it difficult if not impossible for the public to determine if a firm is a small business or a large business. The SBA's actions around this issue are obviously questionable and need to be investigated and exposed.

ASBL will file suit on this request and we will prevail. I do not believe the federal court is going to accept SBA's position that despite the fact that you have issued several press releases bragging about the volume of federal contracts that have been awarded to small businesses, you have absolutely no idea who those firms actually are.

To date, I have not received the information requested in my initial letter; therefore, I am resending our appeal as you requested.

I have included a copy of my original request.

Thank you for your consideration of this appeal.

Sincerely,

Mr. Christopher Gunn  
3910 cypress Dr.  
Petaluma, CA 94954  
707-789-9575  
cgunn@asbl.com







**U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416**

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

December 18, 2007

Mr. Christopher Gunn  
American Small Business League  
3910 Cypress Drive  
Petaluma, California 94954

Re: FOIA #22796

Dear Mr. Gunn:

This constitutes our final response to your November 19, 2007 Freedom of Information Act (FOIA) appeal for "The specific names of firms that were coded as small businesses for FY 2006 and the specific dollar volume of contracts that were awarded to those firms." Your appeal included a request for data for FY 2005 also, although your September 20, 2007 initial request only asked for 2006 data.

The Small Business Administration (SBA) does not collect the information you request. The General Services Administration's (GSA) Federal Procurement Data System (FPDS-NG) database is the federal government's repository for procurement data. When SBA finds a need for any information concerning Federal prime contracting awards to small businesses, like other Federal agencies and the public, we extract it from the FPDS-NG. We suggest you contact GSA directly through <https://www.fpds.gov>, or the following individuals:

Ralph Boldt/[ralph.boldt@gsa.gov](mailto:ralph.boldt@gsa.gov) /202-501-3094  
Director, Internal Controls and Audit Division

Marya Pickering/[marya.pickering@gsa.gov](mailto:marya.pickering@gsa.gov) /202-208-6000  
Senior Advisor, Office of the Chief Acquisition Office

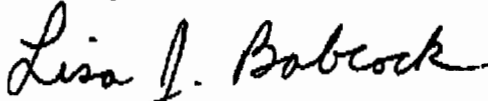
Pat Brooks/[pat.brooks@gsa.gov](mailto:pat.brooks@gsa.gov) /703-872-3249  
FFPDS-NG Manager



Mr. Gunn  
Page 2

Please be advised that you have exhausted your administrative remedies with regard to this appeal. You may pursue this matter in the United States District Court for the district in which you reside or have your principal place of business, where the records are located, or in the District of Columbia.

Sincerely,



Lisa J. Babcock  
Chief, Freedom of Information/  
Privacy Acts Office